U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

JAN 8 2001

File: EAC-98-078-50260 Office: Vermont Service Center Date:

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

IN BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

John F. Grissom

John F. Grissom, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on motion. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

According to 8 C.F.R. 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5). The director determined that the petitioner had failed to establish that he had invested, or was in the process of investing, the requisite amount of capital. The director further found that the petitioner had failed to demonstrate that his investment had created or would create 10 new full-time jobs. The Associate Commissioner affirmed the director's decision.

In support of the motion, the petitioner argues that the entire $500,000 has been invested in the new enterprise and that the enterprise has created more than 10 new jobs.

§ 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
>
> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The petitioner indicates that the petition is based on the creation of a new commercial enterprise in a targeted employment area for

which the required amount of investment made has been adjusted downward to $500,000.

MINIMUM INVESTMENT AMOUNT

At the time of filing, the petitioner stated that [redacted] would be located in [redacted] Queens. In July 1998, he stated that the store could instead be located on [redacted] in the Bronx. In October 1998 he stated that the store would be located on [redacted] in the Bronx. At the time of the appeal, the record contained no indication that the petitioner had signed a lease for [redacted]

As the petitioner had yet to secure premises for [redacted] the Associate Commissioner concluded that the petitioner failed to meet his burden of demonstrating that [redacted] was or would be principally doing business in a targeted employment area as defined in 8 C.F.R. 204.6(e). See also 8 C.F.R. 204.6(j)(6). Therefore, the Associate Commissioner determined the amount of capital necessary to make a qualifying investment in this matter was $1,000,000.

In support of the motion, the petitioner submitted a lease indicating [redacted] was opened in the Bronx. Therefore, at this time, any new jobs at the existing stores would be created in a targeted area. As such, the amount of capital necessary to make a qualifying investment in this matter is $500,000.

INVESTMENT OF CAPITAL

8 C.F.R. 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. ...
>
> *Commercial enterprise* means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is

engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a non-commercial activity such as owning and operating a personal residence.

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The record reveals that at the time the petition was filed, the petitioner intended to invest $500,000 in two retail clothing stores (referenced as [redacted] and [redacted]. However, the petitioner had merely deposited $100,000 of questionable origin into a bank account belonging to [redacted]

The Associate Commissioner discussed each document in the record at length, concluding that the petitioner had not committed sufficient funds or taken meaningful, concrete action before filing the petition. The Associate Commissioner noted that despite subsequent deposits into the corporate account and a stock certificate indicating an investment of $500,000 (issued prior to the petitioner's transfer of $100,000 to the corporate account), at the time of filing the petitioner had only transferred $100,000 to Mony Stores, Inc. The remaining $400,000 wired to the petitioner's personal account remained uncommitted. The Associate Commissioner also noted that as of the date of filing, the petitioner had not even secured premises for either store. (In response to a request for additional information, the petitioner subsequently submitted a lease for Store 3, signed February 23, 1998.)

8 C.F.R. 204.6(j)(2) permits a petitioner to establish eligibility by demonstrating that he is actively "in the process" of investing the requisite amount of capital. A petitioner must, however, be eligible for the benefit sought at the time of filing; a petition may not be approved at a future date after a petitioner becomes qualified under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, at the time of filing, a petitioner must already be in the process of investing.

In support of the instant motion, the petitioner submits a lease for [redacted], located at 300 East Fordham Road, Bronx, New York; several weekly schedules for the employees of that store; and employment applications, W-4s, and I-9s for nine employees. Counsel asserts that the stock certificates were issued as a "symbolic gesture," with the "understanding" that the petitioner "had to commit the $500,000 within a few months." Counsel concludes, "as of the date of filing, there existed various documents and agreements that committed the Petitioner to investing $500,000." Counsel identifies these documents as the shareholder's agreement and the business plan. Counsel argues these two documents:

> may have evidenced mere intent to invest and not a present commitment of funds . . had there not been any kind of investment of funds on Petitioner's part. Yet, Petitioner's commitment of $100,000 prior to the date of filing, together with the special trust existing between parties involved, demonstrate that Petitioner was 'in the process' of investing the requite [sic] amount of capital.

The petitioner cannot establish that his funds were at risk and committed solely based on an unwritten "understanding" between himself and the other shareholders. The petitioner must document that his funds were legally and enforceably committed. As stated by the Associate Commissioner, the first payment of $100,000 was made on the same day that the petitioner executed his Form I-526. The two subsequent transfers of funds were apparently prompted by the Service's correspondence; the amount of $100,000 was deposited about three weeks after the petitioner received the director's letter of May 12, 1998, advising him that he was not eligible, and the amount of $300,000 was deposited less than a week after the director denied the petition on August 26, 1998. It remains, as of the date of filing, just $100,000 had been committed to Mony Stores.

Not only was an inadequate amount of money committed as of the date of filing, but the funds committed were not yet at risk according to the standards in Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998). The petitioner argues that he has undertaken meaningful concrete business activity by opening Store 3 and now Store 4.

While the director conceded that, as of the date of denial, approximately $187,000 of the then-deposited $200,000 had already been spent, the Associate Commissioner, in his decision, disagreed. The Associate Commissioner pointed out that [redacted] opened for business in March 1998, and the checks paid to [redacted] all drawn from account number [redacted] (one of two corporate accounts to which the petitioner wired money), extend well beyond that date. It is clear that profits from the sale of the first "set" of inventory were used to purchase replacement inventory. Therefore, an amount far less than $200,000 of the petitioner's funds was required to start [redacted] In response, counsel asserts, "by virtue of Petitioner's investment, the first few sets were paid for, and the interim profits from operation were used to pay for inventory purchased thereafter." Even if true, this statement does

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[1]David Assis was also supposed to have invested at least $100,000; it is not known if he did so in order to obtain his 98 "fully paid" shares of stock that had a purchase price of $294,000.

not address what amount of the petitioner's funds were invested in Store 3, as opposed to the reinvestment of profits.

On motion, Counsel does not address the Associate Commissioner's concerns regarding the petitioner's deposits into two different [redacted] accounts and his failure to establish how much was deposited into each account except to assert that the director had not questioned that the full $187,000 came from the petitioner. The Associate Commissioner adjudicates appeals based on a de novo review of the facts. Contrary to counsel's assertions, the director's conclusions are not binding on the Associate Commissioner.

Counsel also fails to address the Associate Commissioner's conclusion that, as no action had yet been taken towards [redacted], the remaining $300,000 was not fully at risk even at the time of the appeal. Even at this time, the petitioner has not shown that the remaining $300,000 were actually used to start up [redacted] as opposed to the profits of [redacted].

Most significantly, it remains that, as of the date of filing, the petitioner had not even secured premises for either store and had not undertaken meaningful concrete activity. In fact, the petitioner does not even seem to have been involved in the negotiation of the lease for [redacted] as the draft submitted with the petition shows the tenant as [redacted] Inc., not [redacted], Inc. While the tenant was changed to [redacted], Inc. on the final lease in all places other than the signature page, it remains that the petitioner at most took over ongoing negotiations to open the store.

As stated by the Associate Commissioner, in the very least, the instant petition was filed prematurely. As of the date of filing, the petitioner had committed only $100,000 to the new commercial enterprise, and these funds were not at risk. For this reason, the petition must be denied.

ESTABLISHMENT

The Associate Commissioner concluded that the evidence of record was inconsistent, contradictory, and incomplete as to the corporate entities involved. Specifically, the petitioner had failed to document the establishment of Mony Stores Inc., as required by 8 C.F.R. 204.6(j)(1) or the relationship between [redacted] Inc. and [redacted]

On motion, the petitioner submits the filing receipt documenting that Mony Stores, Inc. was incorporated on October 28, 1997. Counsel points out that while the lease for [redacted] is signed by [redacted] of [redacted] Inc., the tenant is identified as

[redacted], Inc. everywhere else on the lease. Based on the record as a whole, [redacted], Inc. appears to be a new commercial enterprise.

SOURCE OF FUNDS

8 C.F.R. 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
>
> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
>
> (iii) Evidence identifying any other source(s) of capital; or
>
> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

The petitioner alleges that the $500,000 invested in [redacted] Inc. was obtained through an unconditional gift from his brother, [redacted] in Panama (a different [redacted] than the other shareholder of [redacted] Inc.) The Associate Commissioner stated that the inquiry into the lawful source of investment funds does not end upon a petitioner's claim that his funds were a "gift."

Counsel argues that by requiring [redacted] to document the legality of the funds, the Service demonstrated "a pre-conceived notion to deny Petitioner's application, when it chose to get into

such details and nuances. It has gone as far as implying that Petitioner may have obtained monies illegally."[2]

The Associate Commissioner did *not* imply *this* petitioner laundered funds obtained illegally by funneling them through his brother and then claiming the funds to be a gift. Rather, the Associate Commissioner used an example to explain why the simple statement that the money was provided as a gift is insufficient. The Associate Commissioner is correct that any petitioner intending to conceal the true source of his funds, such as for example a third-party loan, criminal or other unlawful activity, or earnings not subjected to appropriate taxation, could offer the convenient explanation that the funds were a gift. The Associate Commissioner is also correct that presenting a corroborating statement from a family member or "friend" would not be difficult, nor would transferring the funds first to the family member's account and then documenting their transfer into a newly established account belonging to the petitioner.

Counsel concedes that the petitioner is unable to document the source of his brother's gift. Therefore, the petitioner has failed to demonstrate that the funds originated from a lawful source.

Moreover, it is not even clear that the $500,000 deposited into the petitioner's account originated from his brother, [redacted], and not his business partner, [redacted] The bank account from which the funds were wired is in New York. The petitioner's brother has not documented that he owns an account in New York. As such, the petitioner has not established that the funds are not merely those of his business partner wired to the petitioner with the understanding the funds would be immediately returned to their business.

SOURCE OF OTHER FUNDS

8 C.F.R. 204.6(g)(1) states, in pertinent part:

> The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons...**provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.**

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[2] The petitioner himself admits to having obtained money illegally by claiming to have worked after his authorization to do so expired.

The Associate Commissioner concluded that the other shareholders of [redacted] had not established the lawful source of their investment funds. The motion does not address this conclusion. As such, there is no need to further address this issue.

EMPLOYMENT CREATION

8 C.F.R. 204.6(j)(4) discusses job creation, and states:

> (i) *General.* To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
>
> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
>
> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. 204.6(e) states, in pertinent part:

> *Employee* means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise...This definition shall not include independent contractors.
>
> *Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

The Associate Commissioner noted the petitioner was already finished with starting [redacted] and did not claim that he would complete his employment-creation requirement there. The Associate Commissioner also stated that the fact that the petitioner has opened one store and has formulated a business plan does not necessarily mean that he will open a second store in two years. The Associate Commissioner concluded that not only had the petitioner failed to establish the level of full-time employment at [redacted] he had failed to demonstrate that Mony Stores will create any further employment.

In support of the motion, the petitioner submits employment applications, W-4s, I-9s, and work schedules for [redacted] and Store 4. The work schedules appear to document that an additional six or seven full time employees are now working for [redacted]

However, while the petitioner has established that [redacted], Inc. leased [redacted] and the store is now operating, he did not establish that any of his personal funds were used to start up the new store. Even if the petitioner were the sole shareholder of [redacted], which he is not, the corporation is a separate legal entity from the petitioner. See Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998). The petitioner has not established that the profits of [redacted] were not used to start up [redacted] instead of the $300,000 which the petitioner claimed he would use to start up [redacted] As such, he may not be credited with any employment created by [redacted]

CONCLUSION

While the documentation submitted with the motion resolves some of the concerns expressed by the Associate Commissioner, the petitioner has not documented that he invested $500,000 of his own funds which had been committed and placed at risk *at the time the petition was filed.* Nor has the petitioner documented the lawful source of the $500,000 which was wired to his account or that his investment created 10 new jobs.

The burden of proof in these proceedings rests solely with the petitioner. § 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden. Accordingly, the previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of February 10, 1999 is affirmed. The petition is denied.